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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1635

THOMAS E. REILLY, JR.,
NELL BETHEL,
JEAN MERRITT,
REMI C. PATTON
RICHARD ROSENTHAL, Individually
and as members of the Indiana
State Teachers Retirement Fund
Board,

Petitioners,

- VS -

MARY F. ROBERTSON,
ESTHER DAVIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

Attorneys for Petitioners

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

Central Publishing Company, Inc., Indianapolis, Ind. 46206

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

Petitioners, Thomas E. Reilly, Jr., Nell Bethel, Jean Merritt, Remi C. Patton, Richard Rosenthal, Individually and as members of the Indiana State Teachers Retirement Fund Board, respectfully pray this Court issue a Writ of Certiorari to review the judgment of the Supreme Court of Indiana entered in NO. 376 S 92 on February 22, 1977, which affirmed the judgment of the Vanderburgh Circuit Court, Vanderburgh County, Indiana, issued April 3, 1975.

OPINION BELOW

The opinion of the Supreme Court of Indiana issued on February 22, 1977, has not been officially reported, but has been appended hereto at page A-1. A Petition for Rehearing was denied by the Supreme Court on April 21, 1977. See appendix, page A-23. The opinion of the Vanderburgh Circuit Court will not be officially reported, but has been appended hereto at page A-24.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3) and Rule 19(1)(a) of the Rules of this Court, to review an opinion of the Supreme Court of Indiana which has rendered a decision on an alleged right or privilege claimed under the Constitution of the United States and the State of Indiana. That decision was made contrary to the case law developed by this Court and it will have a significant impact on future cases.

The decision of the Supreme Court of Indiana was entered on February 22, 1977, and this Petition is timely in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. § 2101(c).

QUESTION PRESENTED FOR REVIEW

Whether, using the fair and substantial relation test, there is a denial of equal protection of the laws in paying an unequal monthly annuity benefit to retired male and female teachers when that payment is computed by the use of separate male and female life expectancy tables.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in part:

> § 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, § 23 of the Constitution of Indiana provides:

> The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

STATEMENT OF THE CASE

This Petition arises from a decision of the Supreme Court of Indiana in a case brought as a class action to challenge the method of payment of annuity benefits to recipients of the Indiana Teachers' Retirement Fund (hereafter Fund). The Plaintiffs, who are females, alleged that the use of two separate tables for the computation of the annuity portion of their monthly retirement checks was discriminatory in that they received lesser amounts than comparable males.

Facts Material to the Consideration of the Question Presented

Plaintiff Robertson, an active teacher in the Vanderburgh County, Indiana, school system, filed her "Complaint for Injunction and Damages" on January 2, 1974, and the cause was certified as a class action on September 4, 1974. Plaintiff Davis, a retired teacher, was allowed to intervene on January 6, 1975. The trial on the merits

was held on January 25, 1975, and judgment was for the Plaintiffs. See Appendix p. A-24.

Following an appeal by the Board the Supreme Court of Indiana affirmed the Trial Court, holding that the use of different mortality tables was an unconstitutional "violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Privileges guarantee of Art. 1, § 23 of the Indiana Constitution." A-17.

The check that a retiree receives each month is composed of money from two separate funds, i.e., the annuity savings account and the pension reserve account. See Indiana Code, 21-6-1-10. The pension reserve account is the State portion of the retirement fund and is exactly equal in all respects for all recipients, male and female. The annuity savings account is based upon teacher contributions at the rate of three (3) percent of their salary and the interest derived thereon. Record page 334 (hereafter R.p. ——).

The annuity portion of a retiree's check is approximately 13% of the check and the State portion is the remaining 87%. R.p. 335.

Upon retirement, male and female retirees participating in the Fund may select one of seven options for the repayment of their annuity benefits. R.pp. 338 and 530.

The purpose of an annuity plan is to repay the amount of principal and interest to an annuitant over his lifetime as opposed to life insurance which is designed to pay a death benefit upon the death of an insured. The annuity protects a person from living longer than his income, and life insurance protects from dying too early. R.pp. 514 and 523.

There are no differences in the Retirement Fund based upon sex in regard to the age at which a teacher may retire or the length of service required for retirement. I.C., 21-6-1-11.

The undisputed evidence in this case, and all mortality statistics, whether United States population surveys, Social Security statistics, annuitant death rates, life insurance experience, or world-wide health studies, clearly show that at all ages women's average life expectancies are substantially longer than men's R.pp. 513, 525-527, and 593.

Sex and age are easily ascertainable factors for use in the administration of an annuity plan. R.pp. 513 and 514.

Women may receive substantially higher monthly benefits than comparable males under the "B" options. R. pp. 596 and 597.

Retired women teachers, as a group, live longer than retired male teachers, and therefore, receive their monthly retirement checks for a longer period of time. R. p. 528.

If comparable male and female retirees select the "B" options, males as a group will never receive as large of benefits as females as a group. R. p. 530.

REASONS FOR ALLOWANCE OF THE WRIT

I.

There is no violation of the Equal Protection or Equal Privileges Clauses in the payment of unequal monthly annuity benefits to retired male and female teachers.

A.

Fair and Substantial Relation Test

It is well settled in Equal Protection litigation that the primary test is whether there is a reasonable relationship

between the objective sought by the classification and the means used to achieve the objective. *Royster Guano Co. v. Virginia*, 253 U.S. 412, (1920). The Equal Protection clause only denies to the States the power to legislate different treatment for persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the statute. This, the Defendants submit, is true even where the alleged discrimination is based on sex.

In *Reed v. Reed*, 404 U.S. 71, (1971), this Court utilized the rational relation test in sex discrimination cases. Inferentially, the Court held that sex was not a suspect criteria which would trigger a high scrutiny test. Then in *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973), four Justices concluded that classifications based upon sex were inherently suspect and would trigger a high scrutiny test. It is significant, however, that in *Frontiero*, only four Justices concluded that sex was an inherently suspect criteria. With one dissent and one separately concurring opinion in the judgment, the remaining Justices joined in an opinion which specifically rejected the conclusion that sex was an inherently suspect criteria.

There have been no cases decided by this Court since *Reed* and *Frontiero* which held that sex is a suspect criteria.

In the majority opinion in this cause, the Supreme Court of Indiana stated, A-8:

> . . . We conclude that the fair and substantial relation standard is to be applied here. In order for a classification to satisfy the guarantee of equal protection it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." . . .

Both Plaintiffs' and Defendants' witnesses testified that the objective of an annuity is to pay an annuitant a sum certain over a prescribed period of time, *i.e.*, the balance of the annuitant's lifetime. Plaintiffs' Witness Hebel, R. p. 514, lines 12-16, Defendants' Witness Jones, R. p. 523, lines 7-11. That objective, in this case, is further governed by I.C. 21-6-1-6 (b) which states that: "The board shall provide for an actuarial investigation during the year 1953 and every six (6) years thereafter, and more often as the board may decide."

Guided by this statutory requirement, and after consultation with its actuary, the Board in 1971 changed the method of computation of annuity benefits to retired teachers from the use of a single life expectancy table for both males and females to the use of the 1971 Group Annuity Table-Male for males and the same table with a five year set back for females. Thus, the 13% of the benefit check for new retirees which is paid through the annuity was no longer equal on a monthly basis, but allowed males a higher monthly payment.

The Board would submit that this change was certainly reasonable, was not arbitrary, and was based upon clearly recognized, statistically proven facts.

The objectives sought by the classification is the maximum possible payments of annuity benefits to all parties in consideration of the amount of principal available for the purchase of an annuity plan, and to insure that all parties will receive payments during their entire lifetime without bankrupting the fund. The method adopted accomplishes this by acknowledging a demonstrable fact of life; that women live longer than men. The means used to achieve this objective are eminently reasonable; the use of actuarial tables that reflect the relating of life expec-

tancies between men and women. There are no more reasonable means available.

Current actuarial tables introduced by the Board at trial point up the fact that as a group, women live longer than men. This simple fact of life has been judicially noted by this Court in *Reed v. Reed, supra,* and it applies to men and women teachers also. Those actuarial tables indicate that males retiring at the age of 65 are expected to live an additional 14 years while females retiring at the same age are expected to live an additional 18 years. In fact, all of the tables introduced as Defendants' Exhibit 1 show that women are much preferred over men as to longevity of life. Table 5.2 of that exhibit shows that at all ages between 0 and 85 there are more female survivors than male survivors out of 100,000 births, and as the ages increase, that difference in survivors expands tremendously. For example, at age 40, there are 91,369 male survivors and 94,964 female survivors. However, at age sixty there are 73,622 male survivors and 84,830 female survivors, and at age 80 there are 24,466 male survivors and 45,973 female survivors. R. p. 593B.

Table 5.3 shows that at every age between 0 and 85 females have a longer life expectancy than males. Table 5.5 shows that in 1929 the average estimated life of males was 55.8 years and that of females was estimated at 58.7 years, or a difference of 2.9 years. In 1969, that table shows that the average estimated life of males was 66.8 years while that of females was 74.3 years, or a difference of 7.5 years. R. p. 593F.

Thus, it is well established that females are preferred over males as to length of life, and that preference must be considered in computing the method and amount of repayment of a fixed sum to a retired teacher over the

remaining lifetime of that teacher. Male and female tables are the only rational method to do that.

When the teachers retirement fund statutes were amended in 1921 to provide for the actuarial investigation now appearing in I.C. 21-6-1-6(b), the life expectancy of a male and female at age 60 was 14.72 and 15.93 years respectively, or a difference of 1.21 years. However, in 1969, that life expectancy had increased to 16.0 and 20.5 years respectively, or a difference of 4.5 years. See Table 5.4 of Defendants' Exhibit 1. The Defendants would submit that while it was entirely rational to pay males and females the same in 1921, it is not rational to do so now in view of the significant increase in female life expectancy. To continue the methods of 1921 is to ignore the data and experiences collected for fifty years that show conclusively that females live much longer than males.

The amount of payment of any purchased annuity plan is always relational to the period of payment. Where that period is fixed, the amount of the payment is dependent solely on the amount of principal used to purchase the annuity. Where that period is indefinite, as when a policy provides for payment for the remainder of the annuitant's life, and the amount of principal is fixed, an actuarial table is the only method available to determine the amount of the periodic payment.

Actuarial tables discriminate against no one since they merely reflect the realities of life. If a man and woman purchase an annuity from a private fund with the same amount of principal, and that annuity is to give periodic payments for the life of the annuitant, the man will receive larger periodic payments than the woman, since the man

will probably die sooner. However, both will receive about the same total payment; the man receives fewer, but larger payments, and the woman receives smaller, but more payments.

As Chief Justice Givan correctly pointed out in dissent:

> Prior to the adoption of that method of determining benefits, men teachers and women teachers were charged equal premiums for their participation, and upon retirement, were given equal monthly benefits. Because of the fact, which is recognized by the majority, that women have a greater life expectancy than men, the result was an unequal treatment based upon sex. This unequal treatment favored women retirees, in that as a group they received the same monthly benefits, but received them for a longer period of time due to their longevity.
>
> It is obvious from the facts of the case that the Board determined that such unequal treatment should not prevail and the sexes should be treated equally . . . It therefore appears the action of the Board, rather than depriving persons of equal rights, has in fact equalized the benefits under the program.

There was absolutely no evidence introduced at trial to show that any other method of repayment of the annuity portion of the Retirement Fund would guarantee that any woman would receive the same amount as any man, all other factors being equal. In fact, the testimony of Plaintiffs' witness Hebel, regarding annuities generally, was that any method would result in repayment based upon group statistics and would not be relational to any individual retiree. R. pp. 514 and 515. The Trial Court acknowledged this fact in its Conclusion of Law 6(b). A-34.

Therefore, the plan involved herein fully conforms with the requirements of the fair and substantial relation standard, and cures the discrimination that existed prior

to the change of tables. That discrimination will return if the opinion of the Supreme Court of Indiana is allowed to stand.

B.

Judicial Approval of Differential Treatment

The majority based its decision on an assumption which has no factual basis in the record of this case, stating, A-12:

> The legislative purpose of this pension legislation is broader than that envisaged by appellant Fund. Its overall purpose is to provide an incentive to all teachers to remain in teaching as a lifetime career, and to accept the moderate salaries paid teachers, and to forego opportunities in other areas of employment as they may arise. In return, the State enjoys the benefit of having public school students taught by teachers, who, through increased experience and education, have become more effective. The plan does not first have practical effect when teachers become eligible to retire, but begins to operate when the individual teachers first begin to teach. From the outset of a first teaching position the plan is an encouragement to reject alternative types of employment.

In the statutes governing the Teachers Retirement Fund, the only statement even generally relating to purpose is contained in I.C. 21-6.1-2-1;

> "The Indiana state teachers' retirement fund", referred to as the fund in this article, is established to be used to pay benefits to teachers and to supervisors of teachers in the public schools after specified years of service and under other specified circumstances . . ."

Initially it should be noted that there is no "legislative history" available for this statute. Secondly, counsel would

submit that the statement that at ". . . the outset of a first teaching position the plan is an encouragement to reject alternative types of employment" does not really reflect the impact of the plan on a new teacher. Twenty-two year old people rarely, if ever, are concerned about retirement benefits, and even if they were, the State's 87% portion of the benefit takes care of that interest. The annuity is an "extra" which the State allows teachers in order that they may have more money available during their retirement years. This is evident by the passage of I.C. 21-6.1-4-10 which provides for the privileges of allowing additional contributions to the individual's annuity account.

Nevertheless, the majority states that the plan is "effective" at the outset of the teacher's career, but then states, A-13:

> . . . However, the possibility that male teachers have been or will be dissuaded from staying in the teaching profession because of the differential treatment afforded them, arising out the receipt of an equal annuity benefit, which benefit itself is a small part of each periodic payment, is speculative and remote . . .

Thus, says the majority, differential treatment to females violates equal protection and drives females from the teaching profession, but differential treatment to males is "speculative and remote." A-13.

Further, the majority states that the difference in treatment to a male "under unisex and sex-segrated (sic) tables is practically immeasurable," A-13, even though the record shows that the difference would be a 15% decrease in the buying factor for men. R. pp. 524, line 23 through 525, line 10. The majority then concludes that it is "highly unlikely" that male teachers would be concerned about differential treatment, that they would stay in the teaching

profession (which is not even the issue involved), and therefore, the plan fails the fair and substantial relation test of equal protection.

C.

Selection of Repayment Plan is Optional

The majority opinion ignores the important fact when a teacher retires he or she has the privilege of selecting one of seven separate retirement options. Those programs are designed to meet different ends, and the retiring teachers may select the one best suited for their situation.

Of those seven possible programs, Plaintiffs directed all of their evidence to the A-1 option. R. p. 484, line 14; R. p. 487 lines 26-28. The Board will admit that the A-1 option is the most selected option, and will further admit that if a male and female teacher selecting that option die at the same time having all factors equal, then the female will receive less benefits than the male. However, the record shows through the testimony of plaintiffs' witness Martin, that the A-1 option is not selected more than all other options combined. R. p. 471, lines 27-29.

The testimony of Mr. Martin regarding the A-3 option shows that payments to males and females would be equal if they died within 5 years of retirement. R. p. 484, line 15 through 486, line 21. Further, the record shows that if the retirees select any of the three B options and die at the same time with all factors being equal, the female will receive *greater* benefits than the male. R. pp. 596, 597. Since the A-4 option may be selected in conjunction with any of the other options, the result is that with 50% of the available options the female receives greater benefits than a comparable male, and with one of the three remaining options her payout could be equal to the male's.

The Board would submit that if a female retiree has the option of selecting from seven separate programs and voluntarily chooses one of the two or three plans that results in her receiving less monthly benefits than a male, when she could have selected an option that would have paid her more, then that selection cannot be a denial of equal protection.

D.

The Concurring Opinion was Contrary to the Law and the Record Evidence in this Case

The concurring opinion states:

> . . . I am inclined to believe that the stresses, strains and hazards of that profession apply alike to the male and female teacher. Until there is evidence to the contrary I must conclude the mortality rate is the same . . . A-21.

This conclusion does not take into consideration the evidence in this case, or the lack thereof.

The assumption should have been that what the Board was doing was proper unless the *Plaintiffs proved* to the contrary, *Town of Lockport, New York, et al. v. Citizens for Community Action at the Local Level, Inc. et al.*, 97 S.Ct. 1047 (1977). Here, the Plaintiffs did not introduce any mortality tables to show that under any set of circumstances or occupations males and females have the same mortality.

The record evidence was overwhelming that females always outlive males, as groups. Defendants Ex. 1, R. p. 593. In addition, Plaintiffs' witness Martin testified as follows:

Q. 58 Are you familiar with the 1971 female annuity table?

A. I have seen it, but I haven't worked any charts from it.

Q. 59 Well, are you familiar enough to know whether that table would reflect whether women as a group,—strike that. That less women will survive, as a group, out of 100,000, or more women will survive out of 100,000 than men?

A. I didn't make that comparison, but I would say that would be a logical assumption to make.

Q. 60 Do you know of any annuity table that shows anything to the contrary?

A. No, not for that year, no, not right offhand.

Q. 61 Any year?

A. Any year that shows.

Q 62 That out of a group of 100,000, beginning at age sixty-five that in any given year there will be less women alive out of that group than men?

A. Well, as you go further out into time, then you find more women dying out of that original group than men.

Q. 63 No, that's not the question. I am saying taking a total number of 100,000 men and a total number of 100,000 women, in any given year would there be more men living out of that original group of 100,000, than women?

A. I am still a little unclear as to, *are you asking me would this be true under a different table than the one we are using?*

Q 64 *Any annuity table you have ever seen?*

A. *No, I would have to say that the results from this should be similar to any of the tables that I have ever looked at.*

R. pp. 488, line 12 through 489, line 13. (Emphasis supplied).

See also the testimony of Plaintiffs' witness Hebel, R. pp. 513, line 10 through 514, line 2.

Thus, since Plaintiffs failed to prove that mortality for male and female teachers was the same, the conclusion in the concurring opinion was in error and the decision of the Vanderburgh Circuit should have been reversed.

II.

This Case is Appropriate for Review by this Court at this Time

The majority stated:

> It has been established by this Court that the rights intended to be protected by Art. 1, § 23, of the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are identical. *Haas v. South Bend Community Schools, supra.* This does not mean, however, that federal cases interpreting the Equal Protection Clause are binding upon this Court in making an interpretation of the Indiana Constitution. Our interpretation of a state constitutional provision is an independent judicial act of this Court, and in making that judgment, federal cases have only persuasive force. *Midwestern Petroleum Corp. v. State Board of Tax Commissioners,* (1933) 206 Ind. 688, 187 N.E. 882. A-9.

and then concluded:

> . . . that the trial court was correct in adjudging that the objective of this pension legislation is not advanced in a manner consistent with either the Equal Protection Clause of the Fourteenth Amendment or the Equal Privileges Clause of the Indiana Constitution. . . . A-14.

In reaching that conclusion, however, in this case of first impression, the Court relied exclusively on cases from this Court, and, counsel for the Board would submit, decided this case contrary to the directives of this Court. Since this is an issue of utmost importance in Indiana and all other states and the federal government, the Board would submit that this Court should grant this Petition and correct the errors in the Supreme Court of Indiana's opinion. The precedential impact of this case on this newly developing area of the law compels review and reversal of the opinions issued below.

CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment and order of the Supreme Court of Indiana.

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Chief Counsel

Attorneys for Petitioners

Office of the Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6249

APPENDIX

IN THE

SUPREME COURT OF INDIANA

THOMAS E. REILLY, JR., NELL BETHEL, JEAN MERRITT, REMI C. PATTON, RICHARD ROSENTHAL, Individually and as Members of the Indiana State Teachers Retirement Fund Board,	)	
Appellants,	)	
- vs -	)	NO. 376 S 92
MARY F. ROBERTSON and ESTHER DAVIS,	)	
Appellees.	)	

APPEAL FROM VANDERBURGH CIRCUIT COURT
Honorable William Miller, Judge

DeBRULER, J.—

This is an appeal from the judgment of the Vanderburgh Circuit Court invalidating the adoption of separate actuarial tables for men and women retired teachers for the computation of benefits to be paid by the Indiana State Teachers' Retirement Fund.

We have permitted transfer of this appeal to this Court pursuant to Ind. R. App. P. 4(A)(10), recognizing that it "involves a substantial question of law of great public importance and that an emergency exists for a speedy determination."

Appellee Mary Robertson is a female teacher in the Evansville-Vanderburgh County School System, part of whose salary is withheld and paid into the Indiana State Teachers' Retirement Fund ("Fund"). Appellee Esther Davis is a retired teacher who had taught in the same system, who had also contributed to the Fund, and who was receiving benefits therefrom. Appellees filed suit in the Vanderburgh Circuit Court, alleging that by use of actuarial tables adopted in 1972, appellees would receive approximately fifteen dollars less per month in retirement benefits than male teachers of the same age and equivalent teaching experience. This action was brought on behalf of themselves and the class of female teachers retired or eligible for retirement, against the Board of Trustees of the Indiana State Teachers' Retirement Fund and its members as individuals. Appellees advanced four theories of recovery:

(1) That the adoption of sex-differentiated mortality tables deprived appellees of rights under the United States and Indiana Constitutions and under Indiana statutory law. Specifically appellees alleged violation of the Due Process and Equal Protection Causes of the Fourteenth Amendment, and the Rights and Privileges Clause, Art. 1, § 23, of the Indiana Constitution, and that the Board exceeded the authority of its enabling statute, Ind. Code §§ 23-6-1-1 to -6-15-11 (Burns 1975).

(2) That the Board's action deprived appellees of their civil rights contrary to the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970).

(3) That the Board's action violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1970).

(4) That the Board's action "impaired the obligation of contracts" contrary to Art. 1, § 10, of the United States Constitution and Art. 1, § 24, of the Indiana Constitution.

The relief requested was an injunction requiring the payment of equal benefits to male and female retired teachers; a declaratory judgment invalidating the Board's action, and an accounting for the differences in benefits paid, and damages equal thereto.

The trial court severed the trial of the issues of liability and damages. After discovery, trial, and briefing, the court rendered judgment for the appellees on their first and third theories of recovery, holding that:

(1) The use of separate mortality tables deprived plaintiffs of equal protection and equal privileges, in that there was no rational basis for the classification of retired teachers by sex.

(2) The differential payments constituted an unlawful employment practice under Title VII of the Civil Rights Act of 1964.

The trial court held that the Board members were not liable under § 1983, and that the Board had not "impaired the obligation of contracts." The Court appointed a master pursuant to Ind.R.Tr. P. 53 to investigate the amount of individual damages for members of the class. The master was ordered paid an hourly rate plus expenses, which cost was assessed against the Fund.

The Board filed its motion to correct errors and appealed, raising the following issues:

(1) Whether payment of differential retirement benefits to male and female retired teachers violates the Equal Protection Clause (or the Rights and Privileges Clause of the Indiana Constitution).

(2) Whether the Due Process Clause of the Fourteenth Amendment prohibits the Board's action.

(3) Whether such payment violates the Civil Rights Act, and therefore the Supremacy Clause (United States Constitution, Art. VI, cl. 2).

(4) Whether the trial court erred in assessing the fees paid the master against the Fund.

(5) Whether the judgment below is supported by sufficient evidence.

I. STATEMENT OF FACTS

The Indiana State Teachers' Retirement Fund was established in 1915, "to be used and applied in the payment of annuities to persons engaged in teaching or in the supervision of teaching in the public schools of the state . . ." Ind. Code § 21-6-1-1 (Burns 1975). The Fund is administered by its board of trustees. Ind. Code § 21-6-1-3. The Fund consists of an annuity account, into which member teachers contribute a portion of their salaries, (3% annually at the time of the trial of this cause) and a pension reserve account, consisting of funds contributed by the State. Ind. Code § 21-6-1-10.

The Board is authorized to conduct actuarial investigations at least once every six years to determine the level of contributions necessary to provide the required benefits. Ind. Code § 26-6-1-6(b). The benefits provided are of seven different forms, at the retired teacher's option. Teachers' Retirement Fund Rules 22 § 1, 25, Ind. Adm. Rules & Reg. (21-6-1-11)-35, -49 (Burn's Code Ed. 1976). Some of these guarantee repayment of the teacher's contribution, others some payment for life, others some benefit to the teacher's survivors.

The pension portion of a retiree's check is approximately 87% of the total amount of the check and is paid solely from the contribution of the State. The annuity portion

of a retiree's check is approximately 13% of the check total and represents the participation of the retiree in the annuity account contributed by teachers. The pension portion is the same for all teachers who are similarly situated with respect to age, years of service, salary and date of retirement. The annuity portion is not the same for all teachers so similarly situated, in that women retirees receive approximately fifteen dollars less per month than men retirees; and this differential of course reduces the woman's total monthly check by a life *(sic)* amount. The differential in the annuity portion is the result of the adoption and use by the fund of the "1971 Group Annuity Mortality Tables—Male" to calculate the annuity portion due males, and the adoption and use by the Fund of that same table with a five year set-back in the case of women.

Prior to 1972 the Fund for many years in making the calculation of annuity portions used a mortality table which did not subclassify annuitants by sex, and in fact similarly situated male and female annuitants received the same amounts. The contributions of men and women teachers have been equal. The eligibility requirements for participation in the retirement program have been the same for men and women. And both prior to and after 1972, the life expectancy of women as a group has been greater than that of men as a group.

The annuity side of the retirement program for teachers operates much like an annuity contract sold in the private sector. For a sum certain insurer contracts to pay a periodic sum to the annuitant for a term certain or for life. An annuity insures against the risk of living too long while a life insurance policy insures against the risks resulting from premature death. And in the private sector, the terms of annuity contracts are struck by the use of separate mortality tables for men and women.

We turn now to appellant Fund's first contention which is that the trial court erred in adjudging that the adoption and use by the Fund of separate mortality tables to calculate the annuity payments for men and women, deprived appellees of the equal protection and equal privileges of the law.

II. JURISDICTION, STANDING, PROPER PRESENTATION OF CONSTITUTIONAL CLAIM

From the record before us, it clearly appears, and is uncontested between these parties, that the Circuit Court of Vanderburgh County was a tribunal vested with authority to adjudicate appellees' constitutional claims; that the appellees have standing to make those claims; and that those claims have been fully litigated in a suitable adversary atmosphere, and permit of reasonable judicial resolution. *Board of Commissioners v. Kokomo City Plan Commission,* (1975) —— Ind. ——, 330 N.E.2d 92.

III. ELIMINATION OF POSSIBLE NON-CONSTITUTIONAL DISPOSITION

We turn next, as it is our duty to do, to determine if this case can be justly disposed of on non-constitutional grounds. *Board of Commissioners v. Kokomo City Plan Commission, supra. Passwater v. Winn, (*1967) 248 Ind. 404, 229 N.E.2d 622. As part of its conclusions, the trial court stated in its judgment:

> "12. Pursuant to IC 1971, 21-6-1-6(a) Burns' Ind. Stat. Ann. § 28-4806(a):
>
> > 'The board of trustees of the Indiana State teachers' retirement fund shall have power to adopt and enforce all necessary by-laws and regulations for the government and administration of the department and the control and investment

> > of the funds committed to its care not inconsistent with the provisions of this act . . . and shall have discretionary power in determining all matters pertaining to its trust not specifically provided for in this act. . . .'
>
> 13. Pursuant to IC 1971, 21-6-1-6(b), Burns' Ind. Stat. Ann. § 28-4806(b):
>
> > 'The board shall provide for an actuarial investigation during the year 1953, and every six (6) years thereafter, and more often as the board may decide . . .'
>
> 14. Acting pursuant to statutory authority, the members of the Indiana State Teachers Retirement Fund Board, as an agency of the State of Indiana, adopted the use of separate tables for computing the annuity portion of retirement checks of teachers in Indiana.
>
> 15. There has been no showing that the members of the Board have acted outside the scope of their authority, or that they could have acted individually to adopt the tables in question."

By these conclusions, the trial court rejected appellees' contention that the challenged action of the Board was illegal as beyond its statutory authority. These conclusions are not clearly in error and appear supported by the statutory references made, and stand unchallenged on appeal. As such they negative the possibility of making a non-constitutional resolution of this appeal.

IV. SELECTION OF THE PROPER EQUAL PROTECTION TESTS (FEDERAL)

Appellant Fund's claim, arising as it does under the Equal Protection Clause, requires that we first determine the proper constitutional standard to be applied. Here the classification of annuitants is based upon sex and affects

the amount of monthly annuity payment received by each annuitant. The Fund contends that its governmental interests in making this classification based on sex are to make the fund more secure and to make a fair distribution of annuity benefits. We conclude that the fair and substantial relation standard is to be applied here. In order for a classification to satisfy the guarantee of equal protection, it "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia,* (1920) 253 U.S. 412, 40 S.Ct. 560, 64 L.Ed. 989; *Reed v. Reed,* (1971) 404 U.S. 71, 92 S.Ct. 251, 30 L.Ed.2d 225; *Haas v. South Bend Community School Corp.,* (1972) 259 Ind. 515, 289 N.E.2d 495; *Indiana High School Athletic Association v. Raike, (1975)* —— Ind. App. ——, 329 N.E.2d 66.[1] The question in this case then is whether the difference in sex between annuitants warrants the Fund's decision to pay lower monthly benefits to women than it does to men.

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[1] In *Craig v. Boren,* (1976) —— U.S., ——, 97 S.Ct. 451, the Supreme Court stated the equal protection standard applied in sex-based classifications as follows: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." 97 S.Ct. at 457. This statement lends credence to the belief of many commentators that the Supreme Court employs an "intermediate" level of scrutiny in the equal protection analysis of sex-based classifications. See discussion and authorities in *Raike, supra,* at 329 N.E.2d 71-78. However, in view of the result reached in this case under the traditional "rational basis" low-level scrutiny, we do not find it necessary to discuss application of heightened levels of scrutiny. Indeed, this case seems unusual in that the result reached is peculiarly independent of the standard employed.

V. THE STATE EQUAL PROTECTION TEST

As appellees' equal protection claim is also raised under Art. 1, § 23, of the Indiana Constitution, we must also determine the legal standard to be applied in enforcing that provision. The standard to be applied here was stated in *Phillips v. Officials of City of Valparaiso,* (1954) 233 Ind. 414, 120 N.E.2d 398, where this Court said:

> "The question of classification, under the privilege and immunities clause of the Indiana Constitution, Article 1, § 23, is primarily for the legislature and does not become a judicial question unless it clearly appears that the legislative classification is not based on substantial distinctions with reference to the subject-matter, or is manifestly unjust or unreasonable." (Citation omitted.) 233 Ind. at 421, 120 N.E.2d at 401.

It has been established by this Court that the rights intended to be protected by Art. 1, § 23, of the Indiana Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution are identical. *Haas v. South Bend Community Schools, supra.* This does not mean, however, that federal cases interpreting the Equal Protection Clause are binding upon this Court in making an interpretation of the Indiana Constitution. Our interpretation of a state constitutional provision is an independent judicial act of this Court, and in making that judgment, federal cases have only persuasive force. *Midwestern Petroleum Corp. v. State Board of Tax Commissioners,* (1933) 206 Ind. 688, 187 N.E. 882.

VI. THE BURDEN OF PLAINTIFF BELOW AND THE BURDEN OF APPELLANT HERE

In the court below, plaintiffs had the burden to negative every conceivable basis which might have supported

its use of sex to classify annuitants. *Madden v. Commonwealth of Kentucky,* (1940) 309 U.S. 83, 60 S.Ct. 406, 84 L.Ed. 590; *Lehnhausen v. Lake Shore Auto Parts Co.,* (1973) 410 U.S. 356, 93 S.Ct. 1001, 35 L.Ed.2d 351. And in that court the Board is presumed to have acted constitutionally in adopting this challenged formula for determining annuity benefits under both federal and state constitutional law. *McDonald v. Board of Election Commissioners of Chicago,* (1969) 394 U.S. 802, 89 S.Ct. 1404, 22 L.Ed.2d 739; *Board, of Commissioners of Howard County v. Kokomo City Plan Commission, supra.*

However, the Board of Trustees of the pension fund, as appellant, has the burden before this Court.

> "It has been held many times that all reasonable presumptions are indulged on appeal in favor of the rulings and judgments of the trial court, that the record must exhibit the errors for which the reversal is sought, and that a court of appeals will not presume anything in favor of appellant to sustain his alleged errors." *First National Bank v. Penn-Harris-Madison School Corp.,* (1970) 255 Ind. 403, 406, 265 N.E.2d 16, 18-19.

Therefore, before us appellant Board must present a ground sufficient to support the use of sex to classify annuitants which the trial court erroneously or arbitrarily refused to accept as sufficient.

The trial court concluded that it was arbitrary and without rational basis for the fund to classify annuitants by sex, and based this conclusion upon, among others, the reasons that sex is only one of innumerable factors influencing life expectancy and other such factors are ignored; that group mortality statistics ignore the traits of the individual female; that 82.9% of females will have the same year of death as 82.9% of the males and as a consequence

those females will die having received less than those males; and that the additional income given retired males monthly will permit them to live in retirement more comfortably than retired females.

On appeal, the Fund contends that the classification of annuitants by sex resulting from its adoption of the separate mortality tables serves to promote the objective of the teachers' retirement legislation by insuring the financial security of the Fund. While steps taken to avoid paying out more in benefits than the fund can bear would promote the security of the Fund and the general objectives of the legislation, there is no showing in the record, nor is there a convincting argument in the briefs of appellant that the adoption of separate tables for men and women would have this effect. No supported assertion exists in the case that the failure of the Board to consider the sex of annuitants in computing their annuity portions prior to 1972 placed the solvency of the Fund in jeopardy to any degree. The trial court found, in support of its judgment, that the liability of the Fund can feasibly be determined by use of a mortality table which ignored the sex of annuitants, and that such a procedure had been followed by the Fund for many years prior to 1972. Appellants' contention cannot be upheld as it is unsupported.

The remainder of appellants' brief, devoted to the equal protection issue, provides support for the proposition that it is more equitable for men to be paid greater annuity benefits than women because men as a group do not live as long as women as a group and therefore have a shorter period of time after retirement in which to collect periodic payments. Implicit in this part of the brief is the assertion that the purpose of the retirement plan for teachers is furthered by the payment of greater periodic sums to retired men.

The legislative purpose of this pension legislation is broader than that envisaged by appellant Fund. Its overall purpose is to provide an incentive to all teachers to remain in teaching as a lifetime career, and to accept the moderate salaries paid teachers, and to forego opportunitites in other areas of employment as they may arise. In return, the State enjoys the benefit of having public school students taught by teachers, who, through increased experience and education, have become more effective. The plan does not first have practical effect when teachers become eligible to retire, but begins to operate when the individual teachers first begin to teach. From the outset of a first teaching position the plan is an encouragement to reject alternative types of employment. The monthly monetary contribution which each teacher must pay into the retirement fund has the same general purpose. It enhances the incentive by giving the teacher an increasing personal stake in the fund from which future payments will be made.

It is to be noted that it is only by remaining in the profession that a public school teacher can participate in the pension plan. Adding to the value of the Fund to each teacher is the fact that the Fund is sponsored, maintained and secured by the state government. And, we also observe that the opportunities of both male and female teachers to qualify for retirement eligibility is equal and the actual standards for eligibility of male and female teachers are the same. And finally, the pension payment and the annuity payment when added together comprise the periodic retirement check received by an annuitant, and that this check is delivered in fulfillment of the promise of the plan that the daily needs of retired persons will be met in part by such periodic payments until death if the annuity for life is chosen. And it is the belief which each teacher has that such checks will be forthcoming on retirement and that

such checks will provide a minimal form of satisfaction for daily human needs that makes the intended incentive operate, which in turn legitimates the entire pension.

The Fund argues that the payment of equal annuity portions to retired men and women would be tantamount to requiring the men in the plan to subsidize the women in the plan contrary to the purpose of the legislation which is to provide an incentive to both men and women teachers to remain in the profession. The incentive to a man to stay in the profession could be lessened by the Fund's requirement that he provide some of the money through his contribution to pay women's benefits. He could conceivably leave the teaching profession, secure employment in the private sector, and buy an annuity benefit on the open market which would be calculated by a male-only mortality table.

As in *Reed v. Reed, supra,* the purpose served by treating men and women differently (here such purpose being the avoidance of this subsidization effect) "is not without some legitimacy." However, the possibility that male teachers have been or will be dissuaded from staying in the teaching profession because of the differential treatment afforded them, arising out the receipt of an equal annuity benefit, which benefit itself is a small part of each periodic payment, is speculative and remote. A reasonable person must conclude that it is the nature of a group annuity plan that each individual annuitant actually receives a unique benefit because the death of each will occur at a unique point in time, and the subsidization of one annuitant of another is constantly going on. In addition, the subsidization factor is demonstrable for the most part in group actuarial terms only, and the difference in treatment of the individual male under unisex and sex-segrated (*sic*) tables is practically immeasurable. And, it is highly likely

that a male teacher would consider any such differential in light of the equal manner in which male and female teachers have qualified by service and age, and contribution, and in light of the equal daily human needs which both male and female annuitants have, and upon such consideration would discount such differential in deciding whether to accept some offer of employment outside public school teaching. We therefore conclude that the difference in sex of annuitants of this pension plan, carrying with it the different group mortality experience, bears no real and substantial relationship to the purposes of the legislation. The man and woman teacher when considered at the point at which each is first qualifying for retirement benefits, each of the same age, and each having qualified by the same number of years and level of service are not by reason of disparate group mortality experience dissimilarly circumstanced, and are entitled to participate equally in the right to receive payments from that fund made up of the contribution of teachers.

And we finally conclude that the trial court was correct in adjudging that the objective of this pension legislation is not advanced in a manner consistent with either the Equal Protection Clause of the Fourteenth Amendment or the Equal Privileges Clause of the Indiana Constitution by the adoption and application by the Fund of the group annuity mortality table with a five year set-back for females, thereby providing a greater monthly annuity payment to males than females.

The Fund has pointed out that the "B" options are available to both men and women teachers, and that under one of the "B" options, a woman will actually receive a greater monthly payment. We are not convinced that the existence of such options render the uneven distribution of benefits under "A" options constitutionally permissible.

From the record we know that "A" options are selected by the vast majority of all annuitants and that "B" options are not the functional equivalent of "A" options.

In two recent cases considered by the United States Supreme Court, sex-based classifications were upheld as consistent with the guarantee of equal protection under law. They merit specific consideration here.

In *Kahn v. Shevin,* (1974) 416 U.S. 361, 94 S.Ct. 1734, 40 L.Ed.2d 189, the issue before the court was whether a state statute granting widows an annual $500 tax exemption violated the Equal Protection Clause as to widowers. The court noted that the financial difficulties confronting the lone woman exceed those facing the man. The job market is inhospitable to the woman seeking any but the lowest paid jobs. While the widower usually may continue in his job, the widow often will have to look for a job with few marketable skills. The court found that the difference rested upon "some ground of difference having a fair and substantial relation to the object of the legislation." The tax law was reasonably designed to further the state policy of "cushioning the financial impact of spousal loss upon the sex for which the loss imposes a disproportionately heavy burden." 416 U.S. at 365, 94 S.Ct. at 1737. In the case at bar, the annuity protects against the risks attendant to living out the remainder of one's life. Those risks do not place a disproportionately heavy burden on men which could justify their larger monthly checks. Therefore, this case is not supportive of appellant's position in this appeal.

In *Geduldig v. Aiello,* (1974) 417 U.S. 484, 94 S.Ct. 2485, 41 L.Ed.2d 256, the issue was whether a state-administered, privately financed health insurance plan for persons in private employment who are temporarily unable to work

because of disability not covered by workmen's compensation could exclude from coverage disability due to normal pregnancy and delivery without violating the Equal Protection Clause. The majority held that the exclusion of that disability was not invidious discrimination. The state did not have to insure all risks. If normal pregnancy were included, the annual employee contributions would have to be increased and the program might no longer be self-supporting. Or, the available funds would be distributed at an inadequate level for all disabilities.

> "These policies provide an objective and wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has. There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not." (Footnotes omitted.) 417 U.S. at 496, 497, 94 S.Ct. at 2492.

In the case at bar the monthly annuity payments are intended to be perceived by potential beneficiaries as providing satisfaction of short term daily needs arising during retirement. By providing greater payments to men, the appellant Fund has provided men with a greater panoply against risks arising from daily human needs. No difference in those risks as between men and women exists, justifying the additional protection afforded men. Viewed with this perspective, *Geduldig v. Aiello, supra,* does not support appellant's position.

Appellant Fund next challenges the decision of the trial court that the adoption and application of different mor-

tality tables for men and women annuitants violated the Due Process Clause of the Fourteenth Amendment, the Supremacy Clause, and rights protected by the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2. In light of the fact that this policy of the Fund has been determined by this tribunal to have been unconstitutional in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Privileges guarantee of Art. 1, § 23, of the Indiana Constitution, we deem it unnecessary to consider these further contentions of appellant. Even if such determinations by the trial court were error, such error would not alter our affirmance of the trial court judgment, since the determination of unconstitutionality under equal protection analysis is a complete and sufficient basis for an affirmance. In these circumstances there is no legal interest of the parties to be served by meeting those issues on their merits. *Willets v. Ridgway,* (1857) 9 Ind. 367; *State ex rel. Johnson v. White Circuit Court,* (1948) 225 Ind. 602, 77 N.E.2d 298.

VII. SUFFICIENCY OF THE EVIDENCE

Appellant Fund next challenges the sufficiency of the evidence to support several of the trial court's findings. Finding No. 14 provides:

> "14. The 1971 Group Annuity Mortality Table-Male adopted by the defendant Board, does not have as its basis the insurance industry's mortality experience with those engaged in the teaching profession."

Appellant points out that the evidence at trial showed that the table was based upon experience with several professions, including teachers. We construe the trial court's finding to be that the table was not based upon experience confined to those engaged in the teaching profession, and so construed, such finding is supported by the evidence.

Findings Nos. 16 and 18 are challenged because they broadly state conclusions about how the benefits of men and women as a group, in the short and long terms, compare, without taking into account the effect of a woman selecting one of the "B" options. While appellant is correct in its contention that the conclusion is incorrect in that it does not reflect the true comparison of benefits received by men and women under some "B" options, this inaccuracy does not render the findings insufficient to support the court's conclusions under the Equal Protection and Equal Privileges provisions unsupported.

In challenged Finding No. 22, the court discusses a hypothetical situation in which a retired male teacher invests his extra annuity and earns income upon that investment. While the trial court may have miscalculated in assessing the exact dollar benefit which a man might derive from such investment, the ability to make such an investment does exist and serves to increase the differential between the benefits received by men and women. The finding is intended to illustrate this ability, and as such is supported sufficiently by the evidence.

Challenged Findings of Fact Nos. 24 and 25 were made by the trial court in support of the trial court's conclusions that the adoption and application of the different mortality tables for men and women served to deny due process of law and rights protected by 42 U.S.C. § 2000e-2. As those issues are not to be considered in this appeal, the findings related to those issues are irrelevant here.

VIII. APPOINTMENT, COMPENSATION, AND DUTIES OF SPECIAL MASTER

Appellant Fund contends that the trial court committed error when, as part of its judgment, it appointed a special

master to determine the financial liability resulting in this case and provided that the master be paid $35.00 per hour and ordered that the fees and expenses of the master be paid by the appellant Fund. After this order was made, appellees, pursuant to Ind. R.Tr. P. 53, sought and obtained an order of this Court concurring in this challenged part of the judgment. On appeal, appellant Fund contends that the $35.00 per hour rate is excessive and contrary to the provision of Trial Rule 53 that the "compensation to be allowed to a master shall be allowed in the manner and amount paid to judges pro tem and such additional compensation as is fixed by the Supreme Court." Appellant Fund points out that Ind. Code § 34-1-13-4 (Burns 1973) limits the compensation of a judge pro tem to ten dollars per day and five cents a mile for travel, and further requires that the compensation of a judge pro tem "be paid out of the county treasury for the time being, for which the county shall have credit on settlement with the treasury of state . . ." and therefore the trial court should not have ordered the master paid directly by a state agency, but should have ordered him paid by the county. We construe the limitations upon the compensation of masters in Trial Rule 53 and the incorporated statute to apply when the trial court acts alone, without concurrence of the Supreme Court to appoint and set the compensation for a master. Consequently these limitations do not bind this Court and a trial court when acting jointly under the authority of Trial Rule 53, to fix, in either manner or amount, the additional compensation due special masters.

Appellant also contends that the rate of $35.00 per hour is excessive in light of the requirement of the order that employees of the appellant Fund are to assist the master in making his computations. The master is both a lawyer

and a certified public accountant, and $35.00 per house *(sic)* does not appear unreasonable to use for the services of a person with this type of training and expertise. Appellant Fund presents no factual assertions tending to show the unreasonableness of this rate, and we do not believe that the fact that employees of the Fund will deliver the raw data to the master for his use in making the calculations shows it.

Appellant Fund next challenges the scope of the direction given to the master wherein he is directed to furnish the court with information relating to the amount of damages sustained by female teachers who have not yet retired. Appellees do not answer this contention in their brief, and we can conceive of no use to which the court could put such information if, indeed such a computation is possible. We, therefore, instruct the trial judge to delete such instruction from the judgment. In all other respects, the judgment of the trial court is affirmed.

Hunter, J., concurs; Arterburn, J., concurs with opinion; Givan, C.J., dissents with opinion; Prentice, J., Dissents without opinion.

ARTERBURN J. CONCURRING.

I concur with the majority opinion. The basis for this is that there is no showing or evidence presented by the Appellant Board that women teachers live longer lives than men teachers. There is no statistical evidence or mortality table presented that shows that in the teaching profession females have a longer life span than males.

I grant that when the population as a whole is considered statistics indicate women on the average live longer lives than men. However, I ascribe that result to the common knowledge that traditionally men engage in more hazardous or stressful occupations (such as mining, steel construction) while many women are engaged in household activities. To me such a fact colors the mortality tables comparing men and women.

We are dealing in this case solely with the teaching profession. I am inclined to believe that the stresses, strains and hazards of that profession apply alike to the male and female teacher. Until there is evidence to the contrary I must conclude the mortality rate is the same. I, therefore, concur in the majority opinion affirming the judgment of the trial court.

DISSENTING OPINION

GIVAN, C.J.

I respectfully dissent from the majority opinion in this case. There is no question that the law stated by the majority is correct in that the equal protection clauses of the Constitutions of the United States and of Indiana and the Civil Rights Act of 1964 all require that persons receive equal treatment. However I do not agree with the majority that when this law is applied to the facts in the case at bar the result is an invalidation of the adoption of the separate actuarial table for men and women retired teachers for the purpose of the computation of their benefits to be paid from the Teachers' Retirement Fund.

Prior to the adoption of that method of determining benefits, men teachers and women teachers were charged equal premiums for their participation, and upon retirement, were given equal monthly benefits. Because of the fact, which is recognized by the majority, that women have a greater life expectancy than men, the result was an unequal treatment based upon sex. This unequal treatment

favored women retirees, in that as a group they received the same monthly benefits, but received them for a longer period of time due to their longevity.

It is obvious from the facts of the case that the Board determined that such unequal treatment should not prevail and the sexes should be treated equally. There were two avenues to pursue which would have resulted in equal treatment. One was to charge the men a smaller premium during their period of actual service, and upon retirement give equal payment to men and women. The other was to charge an equal premium regardless of sex, but upon retirement to pay a smaller monthly amount to the women retirees. The Board oviously chose the latter.

The majority opinion points out that some women live no longer than some men and, in fact, some live a shorter time than some men. However the fact remains that given an equal number of men and women commencing retirement at a point in time, when all of the men have died, there will still be living approximately 17% of the women retirees who will continue to receive their monthly payment. Theoretically, at the time of the death of the last woman, an equal amount of retirement pay will have been received by the group of men and by the group of women. It therefore appears the action of the Board, rather than depriving persons of equal rights, has in fact equalized the benefits under the program.

I would therefore hold the Board's action was entirely proper and that it did in fact cure a situation which was unequal so far as the sexes were concerned.

The trial court therefore should have been reversed, and the plan upheld.

STATE OF INDIANA

INDIANAPOLIS, 46204

Clerk of the Supreme Court
and Court of Appeals

Telephone 633-5200

Billie R. McCullough, Clerk
217 State House

No. 376S92

Thomas E. Reilly, Jr., Nell Bethel, et al V. Mary F. Robertson, and Esther Davis

You are hereby notified that the Supreme Court has on this day Petition for Rehearing DENIED. DeBruler, A.C.J. Givan, C.J. Votes to Grant.

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 21st day of April, 1977.

/s/ BILLIE R. McCULLOUGH

Clerk Supreme Court and Court of Appeals

STATE OF INDIANA)
) SS:
COUNTY OF VANDERBURGH)

IN THE VANDERBURGH CIRCUIT COURT

MARY F. ROBERTSON and ESTHER DAVIS,	)	
- vs -	)	CAUSE NO. 4098
THOMAS E. RIELY, JR., NELL BETHEL, JEAN MERRITT, REMI C. PATTON, RICHARD ROSENTHAL, Individually and as Members of the Indiana State Teachers Retirement Fund Board,	)	JUDGMENT (April 3, 1975)

This cause came on for trial to the Court, without intervention of a jury and the evidentary phase thereof, was concluded on January 25, 1975, on the liability issues raised by plaintiff and intervenor-plaintiff's amended complaint in four Counts and the defendants' amended answers in general denial thereto. The Court had heretofore severed the issues of liability and damages for trial by pre-trail Order, and the trial herein was limited solely to the liability issues. The named plaintiff, Mary F. Robertson, and intervenor-plaintiff, Esther Davis, appeared in person, and for the members of the class, and by counsel, Theodore Lockyear and Steve Barber, and the defendants, Nell Bethel and Thomas E. Riely, Jr., appeared in person and by counsel, Theodore Sendak, by Anthony J. Metz, III, Donald P. Bogard, and the other named defendants appeared by counsel, Theodore Sendak, by John Metz and Donald P. Bogard. The parties waived oral argument and

have submitted extensive pre-trail, trial and post trial briefs, and submitted their proposed Findings of Fact, Conclusions of Law and Judgment entries. The Court heretofore on the 6th day of February, 1975, informally and subject to this judgment, indicated to the parties its decision and judgment for the plaintiffs on Count I and Count III of the plaintiffs' amended complaint and for the defendants on Count II and Count IV of said amended complaint. The Court being now duly and sufficiently advised in the premises determines that all issues are here disposed of except the computation of damages sustained by individual members of plaintiffs' class, now expressly determines that there is no just reason for delay, and directs the entry of this final judgment and does now submit its:

FINDINGS OF FACT

1. Plaintiff, Mary F. Robertson, is in her 24th year as a first grade teacher in the Evansville-Vanderburgh School System, and has contributed to the Indiana State Teacher's Retirement Fund as required by her contract with said school system and by the laws of the State of Indiana, and may retire at anytime.

2. Plaintiff-intervenor, Esther Davis, is a female retired teacher presently receiving monthly benefits from the Indiana State Teacher's Retirement Fund. Esther Davis retired subsequently to July 1, 1972.

3. That the plaintiff, Mary F. Robertson, and intervenor-plaintiff, Esther Davis, are members of the class of female teachers who are presently teaching in the various school systems in the State of Indiana, and those female teachers who have retired on or since July 1, 1972, and who have heretofore pursuant to Order of Court been

properly given notice of the pendency of this action, and who have not notified counsel for the plaintiff, or counsel for the defendants, or Shirley Jean Cox, Clerk of the Vanderburgh Circuit Court, of their decision that they not be parties to the within cause of action. That all others are bound by the final judgment here entered in this cause.

4. That the number of persons who comprise the class represented by the plaintiff, Mary F. Robertson, and intervenor-plaintiff, Esther Davis, number in the thousands and are so numerous that the joinder of the individual members thereof would be impractical, and the filing of separate suits by each member of the class, would constitute a burden upon the Courts. That the joinder of the individual members thereof would be impractical, that there are questions of law and facts common to all members of the class; that the claims of the plaintiff, Mary F. Robertson, and intervenor-plaintiff, Esther Davis, are representative herein as typical of the claims of the class. The plaintiff, Mary F. Robertson, and intervenor-plaintiff, Esther Davis, and their counsel, Theodore Lockyear and Steve Barber, fairly and adequately represented and protected the interests of all members of the class.

5. The parties have stipulated and agreed that those persons whose names and addresses are attached to a Stipulation requesting exclusion from representation and participation as members of the class, is binding upon all the parties and their counsel, and that because of the number and size of said Stipulation, counsels' agreement that said names shall not be set forth specifically in an Order of this Court is approved and said named persons are excluded by reference to said Stipulation.

6. Defendant, Thomas E. Riely, Jr., is president of the Indiana State Teacher's Retirement Board. Defendant,

Jean Merritt, is vice-president and Nell Bethel is secretary of said Board. That the defendants, Remi C. Patton and Richard Rosenthal, are also members of said Board. That said Board members are entrusted with the administration of the Fund and the establishment of the pension benefits paid to Fund members.

7. That all Indiana teachers now contribute 3% of their annual salary to the Indiana State Teacher's Retirement Fund.

8. That upon retirement, the defendant Board pays retirement benefits which comes from two distinct sources:

(a) The "annuity portion" is made up entirely from the contributions of the individual teachers themselves which contribution is now by law fixed at 3% of a teacher's total annual salary, but which in prior years was limited as to the maximum amount a teacher could contribute. The contributions are deducted from the teacher's paychecks and paid to the Indiana State Teacher's Retirement Fund.

(b) That in addition, there is a "pension portion" which is wholly the contribution of the State of Indiana.

That the annuity portion of a retiree's monthly check makes up approximately 13% of the total of the check, with the State portion making up the remaining 87%. That all retirees are paid the annuity and pension portion in a single monthly check.

9. That prior to July 1, 1972, and for more than twenty-five years prior thereto, all Indiana teachers upon retirement, regardless of sex, received equal State pension and annuity payments, all other factors, such as age, years of service, salary, and date of retirement, being equal. Sex is not a factor in determining the amount that is contributed by any teacher to the Fund.

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10. That the defendants pay all retired teachers, regardless of sex, equal amounts annually from the State "pension portion" where all other factors such as age, years of service, salary, and date of retirement are equal.

11. That approximately 70% of the retired teachers presently receiving benefits from the Indiana State Teacher's Retirement Fund are of the female sex. That approximately 60% of all teachers now teaching and presently contributing to the fund, are of the female sex.

12. That the defendant Board adopted the use of the 1971 Group Annuity Mortality Tables—Males and thereafter adopted buying factors which consist of the male buying factor to be applied to the annuity portion of a retiree's pension benefits with the same identical buying factors being used for females with a five year setback. That although the defendant Board adopted the use of the 1971 Group Annuity Mortality Table—Male and Female, the 1971 Group Annuity Mortality Table—Female, has never been used in making payment, but instead the 1971 Group Annuity Mortality Table—Male with a five year setback is used.

13. Since July 1, 1972, the annuity portion of a retired teacher's benefits paid from the fund has been determined by applying buying factors which are different for males than females. That said buying factors find their source in the 1971 Group Annuity Mortality Table—Male, with a five year setback for females, which indicate the expected number of persons from a total male group and a total female group which may be anticipated as dying at any given age. That the use of life expectancy and/or mortality tables would indicate that there are certain differences in life expectancies for men than for women based solely

upon sex, but said tables to (*sic*) not take into consideration that the individual's health, habits, occupation, race or any of the factors which may influence the individual's life expectancy. Prior to July 1, 1972, the same buying factor for males and females was applied to the annuity portion of the retiree's benefits resulting in equal payments to males and females, all other factors such as age, years of service, salary, date of retirement, being equal.

14. The 1971 Group Annuity Mortality Table—Male, adopted by the defendant Board, does not have as its basis the insurance industry's mortality experience with those engaged in the teaching profession.

15. Innumerable factors other than sex, such as an individual's weight, health, smoking habits, race, occupation, geographic location, socio-economic class, drinking habits, and hobbies interact in determining an individual's life expectancy. None of these factors are used by the defendant Board, except the sex of the individual.

16. That on and since July 1, 1972, the annual annuity paid to a retired teacher is less for women than men at any age. Regardless of age, no retired female teacher will receive a total lifetime retirement annuity benefit greater than or equal to that of a comparable male, all other factors being equal.

17. That applying the 1971 Group Annuity Mortality Table with a five year setback for females to equal groups of males and females would indicate that approximately 82.9% of the females will die at the same age as approximately 82.9% of the males. Since the females receive less monthly annuity payments than the males, approximately 82.9% of the females will never have received as much as approximately 82.9% of the males at the time of their death.

18. That the defendants offer seven retirement options. They are: A-1, regular form of retirement; A-2, straight life without death benefit; A-3, modified cash refund annuity; A-4, approximate equalization with primary Social Security benefit and survivor options; B-1, 100% survivorship option; B-2, 66-2/3% survivorship option; and, B-3, 50% survivorship option. Under each of the retirement options available, any retired female teacher will receive either a smaller annual annuity payment that a comparable retired male teacher, or less than she would receive if the male buying factor were applied, all factors other than sex, such as age, years of service, salary, date of retirement, being equal.

19. That the defendants do not segregate the annuity contribution received from Indiana teachers into separate funds according to the sex of the contributor nor does it segregate them into individual accounts. All annuity contributions are kept in one account.

20. That plaintiff, Mary F. Robertson, based upon her present salary, and anticipated length of service and contributions, without any increases in salary, would receive an annual annuity retirement benefit which is $13.38 per month less than a comparable male retired teacher would receive, all other factors, such as age, years of service, salary, date of retirement being equal.

21. That plaintiff-intervenor, Esther Davis, receives under the present system, $78.23 less annually than a comparable male retired teacher receives, all other factors such as age, years of service, salary, date of retirement, being equal. That a comparable male receives 14.7% greater annual annuity than Esther Davis.

22. A male can invest the extra annuity that he receives which fact is not taken into account by defendants' mortality tables. Assuming that a male and female both retire at the same identical age, years of service, salary and date of retirement, and the male is paid $886.50 annually and the female $775.80 annually, the male can invest the $110.70 differential, conservatively at 6% interest. After twenty years, the male's investment would total $4,072.21. If the male should then die during his twenty-first year of retirement, a female retiree would have to live more than five years to just receive an amount equal to the additional annuity and investment interest accumulated by the male.

23. It is actuarily feasible to devise a unisex table for use by the Board. That the adoption and use of a unisex table by the Board would result in the equal payments of retirement benefits to male and female retirees. Prior to July 1, 1972, the defendant Board used a single buying factor for both males and females.

24. The pension benefits paid by the teachers' employer, including both the teachers' annuity and the State pension, is a part of the teachers' compensation, terms, conditions and privileges of employment for services rendered by said teachers.

25. The Board gave no notice to members of the class or contributors to the fund of either: (a) the defendant Boards intention to consider the adoption of different mortality tables; (b) the adoption of the 1971 Group Annuity Mortality Tables; (c) the adoption of buying factors based upon sex which are greater for males than for females; or, (d) that the effect of the Boards' actions would be that females would receive less than a comparable male, all other factors, such as age, years of service, salary, date of retirement, being equal.

26. On December 22, 1971, the Board's actuarial firm of Gabriel, Roeder, Smith and Company, by letter recom-

mended to the Board that it consider changing from the use of the 1937 Standard Annuity Mortality Table and an annual investment return of 3% to use of the 1971 Group Annuity Mortality Table and an annual investment return of 5%.

27. The letter of December 22, 1971 further advised the Board that under the present system then in use, i.e., using factors based upon female mortality, that men teachers could argue that they were being shorted in monthly annuity dollars; that if male factors were used for women and men that a dollar subsidy would be needed to cover the overpayment to women; and that if separate factors were used, some women would argue that they were being discriminated against because they would receive fewer monthly dollars than men.

28. The Board and a representative of the fund's actuarial firm thoroughly discussed the proposed tables in its January 20, 1972 regular board meeting, and decided to consider the proposed tables at its regular February board meeting.

29. At the February 17, 1972 regular Board meeting, after discussion with a representative of the fund's actuarial firm, the Board, by motion passed 4 to 1, adopted the use of 1971 Group Annuity Mortality Tables for Women and Men effective July 1, 1972.

30. The use of the Male 1971 Group Annuity Mortality Table with a five year setback for females is easier to use for calculation purposes than is the use of separate male and female tables, and provides greater benefits to females than would the use of a separate female table.

31. The action of the Board in adopting separate tables was undertaken after correspondence and thorough discussion with its actuarial firm, and was the result of a motion and vote at a regular monthly board meeting.

32. No teacher retiring after July 1, 1972, received less than that teacher would have been entitled to receive if the teacher had retired prior to June 30, 1972.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and the subject matter of this action.

2. Plaintiffs have proven the essential elements and facts of Count I and Count III of their Amended Complaint.

3. The defendants are entitled to recover judgment on Count II and Count IV of plaintiffs' Amended Complaint.

4. The adoption of the 1971 Group Annuity Mortality Table—Male with a five year setback for females, and the subsequent application of different buying factors for males and females with those factors being greater for the males, deprives plaintiffs of the equal protection of the laws and of their liberty and property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and is therefore unconstitutional and invalid.

5. The adoption of the 1971 Group Annuity Mortality Table—Male with a five year setback for females, and the subsequent application of different buying factors for males and females with those factors being greater for the males, deprives plaintiffs of the equal privileges provision in violation of Article 1, Section 23, of the Constitution of the State of Indiana, and is therefore unconstitutional and invalid.

6. That there is no rational basis for the classification based solely upon sex, and this classification is arbitrary and capricious for the following reasons, to-wit:

(a) There are innumerable factors other than sex which influence one's life expectancy, such as weight, health, smoking habits, race, occupation, geographic location, socio-economic class, drinking habits, and hobbies, which the defendant Board has not used. To use only the sex factor and to ignore these innumerable other factors, is arbitrary.

(b) The use of group mortality tables attempts to predict only the life expectancy of a group and does not consider the individual female. These tables cannot predict the life expectancy of any particular individual, regardless of sex. Since actuarial tables do not predict the length of any individual's life, any claim that such tables may be used to assure equal pension benefits to males and females over their lifetime, must fail.

(c) 82.9% of the female teachers, according to the tables adopted by the defendant board, will die at the same identical year of death as 82.9% of the males. Because females are paid less monthly benefits than a male, this means that 82.9% of the females will die having received less than 82.9% of the males who die at the same identical year of death.

(d) Providing the male with additional income per month permits the male to live at a higher standard of living, or to purchase more consumables, or to purchase additional entertainment or luxuries, or to invest and accumulate funds for an estate in excess of that received by the female.

(e) That the sixty month guarantee plan under A-1 makes it impossible for a female and/or her estate to receive as much as the male and/or his estate, if death occurs on or before the 60th month.

(f) That the percentage that the male buying factor exceeds the female buying factor is not constant thereby penalizing the female teacher who retires at age 65 more than one who retires at age 50. The male buying factor at retirement age 50 exceeds the female buying factor by 7.8% whereas at 65 the male buying factor exceeds the female buying factor by 14.3%.

(g) A female who retired before July 1, 1972, receives an amount equal to that received by a comparable male, all other factors being equal, whereas a female who retires after July 1, 1972, receives an amount less than a comparable male on a month to month basis, all other factors being equal.

7. The differential payments made to male and female retired teachers by the defendant Board is unconstitutional and discriminatory in violation of the equal protection clause to the Fourteenth Amendment to the Constitution of the United States and there is no rational basis for the use of said classification.

8. The differential payments made to male and female retired teachers by the defendant Board is unconstitutional and discriminatory in violation of the equal privileges provision of Article 1, Section 23, of the Constitution of the State of Indiana and there is no rational basis for the use of said classification.

9. The annuity payments made by the defendant Board constitutes compensation, terms, conditions or privileges of employment within the meaning of 42 U.S.C. § 2000e-2(a)(1).

10. The differential payments made to male and female teachers by the defendant Board is an unlawful employment practice and discriminates against an individual female with respect to the compensation, terms, conditions

or privileges of employment, because of the individual's sex, in violation of 42 U.S.C. § 2000e-2.

11. The adoption and application of the 1971 Group Annuity Mortality Tables by the defendant Board which permits the payment of greater monthly annuities to men than comparable women, all other factors being equal, is violative of the Supremacy Clause of Article 6, Clause 2, of the Constitution of the United States in that the adoption and application of the 1971 Group Annuity Mortality Tables conflicts with and is pre-empted by 42 U.S.C. § 2000e-2(a)(1).

12. Pursuant to IC 1971, 21-6-1-6(a) Burns' Ind. Stat. Ann. § 28-4806(a):

> "The board of trustees of the Indiana State teachers' retirement fund shall have power to adopt and enforce all necessary by-laws and regulations for the government and administration of the department and the control and investment of the funds committed to its care not inconsistent with the provisions of this act . . . and shall have discretionary power in determining all matters pertaining to its trust not specifically provided for in this act . . ."

13. Pursuant to IC 1971, 21-6-1-6(b), Burns' Ind. Stat. Ann. § 28-4806(b):

> "The board shall provide for an actuarial investigation during the year 1953, and every six (6) years thereafter, and more often as the board may decide . . ."

14. Acting pursuant to statutory authority, the members of the Indiana State Teachers Retirement Fund Board, as an agency of the State of Indiana, adopted the use of separate tables for computing the annuity portion of retirement checks of teachers in Indiana.

15. There has been no showing that the members of the Board have acted outside the scope of their authority, or that they could have acted individually to adopt the tables in question.

16. The Board and its members are not "persons" within the meaning of 42 U.S.C. § 1983.

17. The Board has not impaired any contract rights of female teachers by adopting tables in February, 1972 to be effective July 1, 1972, since the payments to female teachers retiring prior to June 30, 1972 were not reduced.

/s/ WILLIAM H. MILLER

JUDGE, Vanderburgh Circuit Court

JUDGMENT AND DECREE

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant Boards' adoption and application of the 1971 Group Annuity Mortality Tables with a five year setback for females and the establishment of procedures providing for a greater monthly annuity payment to males than females based solely upon sex, is unconstitutional and in violation of the Fourteenth Amendment to the Constitution of the United States.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant Boards' adoption and application of the 1971 Group Annuity Mortality Tables with a five year setback for females and the establishment of procedures providing for a greater monthly annuity payment to males than females based solely upon sex, is unconstitutional and in violation of Article 1, Section 23, of the Constitution of the State of Indiana.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that any statutes, rules, regulations, or orders which authorize and permit the defendant Board to make differential payments to males and females are hereby held invalid, null and void by authority of the Supremacy Clause, Article 2, Section 6, of the United States Constitution, in that they conflict with and are pre-empted by 42 U.S.C. 2000e-2(a).

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendants and their successors are hereby permanently enjoined from adopting any mortality tables or procedures which would result in the payment of different annuity amounts to male and female retired teachers, all other factors, such as age, years of service, salary, and date of retirement, being equal, and the defendants are ordered to immediately institute practices and procedures whereby males and females are paid equal amounts, all other factors being equal, and that said equal payments shall commence with the April, 1975 checks.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that Charles E. Madden be and he is hereby appointed as Master pursuant to Trial Rule 53 of the Indiana Rules of Trial Procedure to determine the exact amount of damages each female retired teacher who is a member of the class herein, has suffered as a result of the adoption and application of the 1971 Group Annuity Mortality Tables herein declared unconstitutional. That the Court files with the Clerk of this Court and furnishes to counsel a copy of resume and qualifications of Charles E. Madden. After said amounts have been determined, Charles E. Madden is to file his report with the Clerk of this Court on or before the 2nd day of June, 1975.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiffs be and they are hereby authorized to file their Motion with the Clerk of the Indiana Supreme Court pursuant to trial Rule 53 of the Indiana Trial Rules of Procedure, together with a copy of this judgment in order to seek the concurrence of the Indiana Supreme Court in the appointment of Charles E. Madden as Master. That upon obtaining said concurrence, counsel for the plaintiffs shall promptly notify this Court and said Master in order that he may commence his duties.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that said Master shall be paid at the rate of $35.00 per hour or such compensation as may be fixed by the Indiana Supreme Court plus reasonable expenses to be incurred, the cost of which is hereby taxed against the fund, and said defendants shall cause said Master to be paid forthwith upon presentation of said Master's statement for services rendered. That because of the peculiar expertise of said Master, said hourly rate is reasonable. That inasmuch as said Master will not be handling funds, there shall be no need for the posting of a bond.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that Charles E. Madden, Master herein, because of special training and expertise, is qualified to expedite the determination of damages herein. That to require the Judge of this Court to hear evidence and to make individual computations as to each member of the class would constitute an undue burden upon this Court, and would prevent this Court from presiding over numerous criminal and civil cases already assigned for trial, and would prevent this Court from functioning in a normal and expeditious manner.

IT IS FURTHER CONSIDERED, ORDERED, ADJUGED AND DECREED that the defendants and/or their employees are ordered to make available all information, records and documents in their possession and to furnish sufficient employees to assist the Master in the computation of the specific damages sustained by each female retiree who has retired since July 1, 1972, as well as furni h the same identical information for those female teachers who have not yet retired in order that a computation may be made as to the additional amount that plaintiff female retirees will receive upon retirement. That said Master shall include as a part of his report, the date of retirement and age of the retiree.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the Indiana State Teacher Retirement Fund Board and its members are not "persons" within 42 U.S.C. § 1983 and are not subject to suit under that statute.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that the plaintiff, Mary F. Robertson, has no contract rights with the Indiana State Teachers Retirement Fund until her retirement.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that judgment is for the defendants in Counts II and IV of plaintiff's amended complaint.

IT IS FURTHER CONSIDERED, ORDERED, ADJUDGED AND DECREED that this matter be assigned for further hearing on the 16th day of June, 1975.

DATED at Evansville, Indiana, this 3rd day of April, 1975.

/s/ WILLIAM H. MILLER

JUDGE, Vanderburgh Circuit Court